DOCUMENT RESUME

03259 - [A2173300]

[Award Based on Erroneous Proposal Evaluation]. B-188628. August 4, 1977. 5 pp. + 6 enclosures (6 pp.).

Decision re: Spectrum; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Defense Communications Agency; Federal Data Corp.
Authority: B-184403 (1976). B-186313 (1977). B-188387 (1977). B-187253 (1977).

The protester alleged that its proposal offered a price which would have been low if the proposals had been properly evaluated. The award based on erroneous proposal evaluation was, therefore, improper, since prejudice to other competitors existed, and the contract option should not be exercised. A solicitation which did not specify the Government's actual requirement and resulted in erroneous proposal evaluation and improper award does not warrant the award of bid preparation costs. (Author/SC)

Martin
P.L. # 2

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03259

**DECISION**

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188628 DATE: August 4, 1977

MATTER OF: Spectrum

DIGEST:

1. Award on erroneous proposal evaluation is improper where prejudice to other competitors exists. GAO recommends that contract option not be exercised.

2. Solicitation which did not specify Government's actual requirement resulting in erroneous proposal evaluation and improper award does not warrant award of proposal preparation expenses in absence of arbitrary or capricious agency action and clear evidence that protester would otherwise have received award.

Spectrum protests the award of a contract to Federal Data Corporation (FDC) under Request for Proposals (RFP) No. DCA 100-77-R-0029, issued by the Defense Communications Agency (DCA). The RFP called for offers to lease, with option to purchase, additions to the memories of four DCA computers increasing each from 128,000 to 512,000 bytes. The initial term of the contract was to run from the date of award until September 30, 1977, although DCA contemplates use of the equipment, through the exercise of renewal options, for a total of 96 months from the date of installation.

Spectrum contends that its proposal offered a price which would have been low by approximately $93,000 if DCA had properly evaluated the proposals in accordance with the terms of the RFP. Spectrum asks GAO to recommend that DCA terminate the FDC contract and award it to Spectrum.

The RFP contained a mandatory Section F.3.10, which required that vendors provide continuous (24 hours per day, 7 days per week) on-call remedial maintenance for the memories with a two hour response time. Remedial maintenance was defined in the "Glossary" of the RFP as the maintenance performed on an unscheduled basis as a result of failure of equipment supplied by the contractor. Section G.4.4., which was another mandatory provision, required that:

"G.4.4. On-Call Maintenance (Applicable if on-site is not required). The Contractor shall provide on-call maintenance service with a 2 hours response time, during the Principal Period of Maintenance which is 0700-1600 at the fixed monthly charges shown in Section I, Table I-1 of this contract.

(a) Should the Government require maintenance service outside the designated Principal Period of Maintenance or extension thereof on an on-call basis, a response time of 2 hours is required. The hourly on-call rates for such additional maintenance service and the maximum charge for any one occurrence shall be as shown in Section K [Attachment 2, Costing Information Questionnaire] of the contract."

The Glossary defined principal period of maintenance as any nine consecutive hours per day between 7 a.m. and 6 p.m. Monday through Friday excluding holidays.

Table I-1, page A2-2, of the RFP required submission of fixed monthly maintenance charges for the principal period of maintenance. Both FDC and Spectrum inserted such prices with those of Spectrum being lower. Section 3.4, page A2-10, entitled "Extended Maintenance Service," required that Table 1 be completed and returned. Table 1, page A2-11, entitled "Optional Extended Maintenance Service and On-Call rates," required the insertion of hourly rates for on-call maintenance outside the principal period of maintenance, a minimum charge per call and a maximum charge for any one occurrence. It also stated that for evaluation purposes, the Government would assume an average of two service calls of 2 hours each per month throughout the system life of the equipment.

Four timely proposals were received and found to be technically acceptable. FDC was determined to be the low offeror. FDC's evaluated price for lease with option to purchase was $373,353. While FDC inserted a fixed monthly rate covering on-call maintenance during the "principal period," it did not provide a price (on Table 1) for maintenance calls at other times. Spectrum's evaluated price was $487,177, which included its fixed monthly charge covering the principal period of maintenance and its rates for maintenance calls for other times. The contract was awarded to FDC without oral or written discussions other than "clarification" from FDC.

DCA states that, until this protest, it believed that the RFP solicited offers only for on-call maintenance at a fixed monthly rate on the basis of 24 hours per day, 7 days per week. It evaluated the proposals on this basis. It also states that Section G.4.4. which sets out the principal period of maintenance requirement was inserted in the RFP by mistake. However, in evaluating the proposals, DCA interpreted FDC's proposal, which offered only the fixed monthly maintenance rates required by Table I-1, as offering the desired continuous full time maintenance service covering both the "principal maintenance period" and other times. The rates offered by Spectrum on Table I-1 were interpreted as applying only to the principal period of maintenance to which DCA added a factor for maintenance calls outside that time. In this connection the agency argues that if the maintenance calls outside the principal period of maintenance in actual practice number 2-1/2 or more per month, the Spectrum offer would not be low. It states that during the first 2-1/2 months since FDC installed the memories, the downtime indicates that required maintenance outside the principal period of maintenance is likely to exceed 2-1/2 calls per month by a significant margin. On this basis Spectrum's evaluated price is considered to be greater than that of FDC. The record, however, is clear that this additive factor of 2-1/2 calls deviated from the evaluation criteria provided in the RFP.

FDC contends that there was an apparent inconsistency between the requirement in Section F.3.10 for continuous on-call maintenance and the provision in Section G.4.4. which separates the maintenance requirement into two service periods. It resolved the alleged inconsistency by applying the order of precedence clause. This clause indicates that in the event of inconsistency the mandatory requirements of Section F should take precedence over inconsistent mandatory provisions of Section G. Because of this, FDC states it did not offer prices for service calls outside the principal period. However, we see no such inconsistency. It is not illogical or inconsistent to require a fixed price for all service calls during normal working hours and separate per call charges for other times. The preferred rule of interpretation is that provisions of an instrument should be construed as being in conflict with one another only if no other reasonable interpretation is possible. 4 Williston, Contracts, § 619 at 731 (3rd ed. (1961)); Lite Industries, Inc.-Reconsideration, B-184403, July 29, 1976, 76-2 CPD 91. The pricing pages, Table I-1 and Table 1, become inconsistent only if the fixed monthly maintenance rates of Table I-1 are interpreted as covering maintenance calls for other periods as well. While the contractor did not insert prices for calls ouside normal working hours because its fixed monthly charge was intended to cover such calls, the contracting officer should have ascertained its intention in this regard through negotiations. The fact that FDC's proposal was low did not become apparent until it was permitted to clarify the proposal after award. We therefore conclude that award should not have been made to FDC without obtaining a clarification as to its intent. This conclusion is reinforced by the fact that the agency actually desires only a fixed monthly fee for maintenance. All offerors should have been permitted to submit proposals on the same basis.

In determining what action should be taken with regard to an improperly awarded contract, the foremost consideration is the best interest of the Government. This, in turn, requires consideration of such factors as the seriousness of the procurement deficiency, the good faith of the parties, the costs to the Government, the extent of performance, the urgency of the procurement, the impact of the remedy upon the user agency and the prejudice to the other offerors and to the integrity of the competitive procurement system. Honeywell Information Systems, Inc., B-186313, April 13, 1977, 77-1 CPD 256.

It cannot be determined what prices Spectrum and the other offerors and potential offerors would have offered if the RFP had been drafted to reflect the agency's actual requirement. Therefore, we believe the circumstances do not justify termination of the FDC contract and award to Spectrum without a new competition.

We believe that the best interest of the Government requires that this improper award be remedied to the extent that it is possible. It is therefore recommended that none of the options in the FDC contract be exercised and that the contract be allowed to expire on September 30, 1977. During the interim period, a new solicitation should be prepared accurately reflecting DCA's actual needs and issued at least to all who received the original solicitation and award should be made in accordance with the terms of the RFP. We are not unmindful of the competitive advantage which FDC will enjoy because its equipment is installed and operating. We also recognize that to some extent the integrity of the competitive procurement system has been compromised and will not be fully corrected by this recommended action. However, in our opinion, the compromise would be greater if this improper award were permitted to stand or award to Spectrum was made without resolicitation.

DCA concedes that while it evaluated the proposals in accordance with its intent, it did not evaluate them in accordance with the terms of the RFP as written. DCA's basic error was in its preparation of an RFP which led Spectrum reasonably to offer a maintenance program which DCA did not want and resulted in an award to FDC which offered the desired program only by ignoring or misinterpreting some of the mandatory solicitation provisions. Although this award was improperly made, we do not agree that DCA's error amounted to gross negligence or was tantamount to arbitrary or capricious action depriving Spectrum of an award to which it was otherwise entitled. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. Thus, the facts here do not warrant award to Spectrum of its proposal preparation expenses. Amram Nowak Associates, B-187253, March 15, 1977, 77-1 CPD 189.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

R. F. Keller

Deputy Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 4 1977

Lt. General Lee M. Paschall
Director, Defense Communications
Agency

Dear General Paschall:

Enclosed is a copy of our decision of today concerning the protest by Spectrum under Request for Proposals No. DCA 100-77-R-0029.

The decision, which sustains the protest, concludes that contract options should not be exercised to extend the contract beyond September 30, 1977, and that a new solicitation should be prepared to accurately reflect the actual needs of the agency.

Because our decision contains a recommendation for corrective action, we have furnished a copy of it to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires that you submit a written statement to the Committees on Government Operations of the House of Representatives and the Senate not later than 60 days after the date of our decision indicating what action has been taken with respect to our recommendation. The Act also requires that you submit in writing to the Committees on Appropriations of the House of Representatives and the Senate a similar statement in connection with the first request for appropriations submitted to the Congress more than 60 days after date of our decision.

We would appreciate being informed of the final action taken in this matter.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

Enclosure

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 4 1977

Mr. Clifford Falkenau
Assistant for Audit Reports
Office of the Assistant
Secretary (Comptroller)
Department of Defense
Washington, D. C. 20310

Dear Mr. Falkenau:

Enclosed is a copy of our decision of today concerning the protest by Spectrum under Request for Proposals No. DCA 100-77-R-0029.

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We would appreciate being informed of the final action taken in this matter.

Sincerely yours,

R.F.KELLER
Deputy Comptroller General
of the United States

Enclosure

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 4 1977

The Honorable Abraham Ribicoff
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today in Spectrum, B-188628, in which we recommend that the Defense Communications Agency should not exercise renewal options under an erroneously awarded contract. We have concluded that the agency should resolicit its requirements on the basis of a revised solicitation which accurately reflects its actual needs.

This matter is brought to your attention pursuant to section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 4 1977

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

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Deputy Comptroller General
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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 1 1977

The Honorable George H. Mahon
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188628

AUG 4 1977

The Honorable John L. McClellan
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

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